No. 1832

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

THE EL DORADO OIL WORKS COMPANY
(a corporation),
Plaintiff in Error,

vs.

THE SOCIETE COMMERCIALE DE L'OCEANIE
(a foreign corporation),
Defendant in Error.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

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Filed this.....day of May, 1910.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING CO.

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1. Statement of the Case.

The parties to this action, on October 11, 1907, executed a written contract for the sale of a cargo of Tahiti copra, per sailing vessel, viz., the brig "Lurline". On the day when the contract was signed, the brig was en route from Puget Sound to Taiohae, and/or Papeete, a few days out, laden with a cargo of lumber, as plaintiff in error knew (pp. 84-85).

Tahiti copra is copra produced in the Society Islands or in the Marquesas Islands (p. 94).

The subject-matter of the sale was, in the contract, described as "*a full cargo of Tahiti copra of fair av-* "*erage quality, per brig 'Lurline', now en route* "*from Puget Sound to Taiohae and/or Papeete*". The place of delivery was specified to be "on quay in San Francisco".

The brig sailed to Taiohae and thence to Papeete, where she arrived on December 1, 1907. There she loaded part of her cargo of copra, then, on December 17, 1907, sailed for Taiohae, where she completed the loading of her cargo of copra on January 20, 1908. Thence she sailed, on January 21, 1908, on her return voyage to San Francisco, where she arrived, with a full cargo of Tahiti copra of the required quality on board, on February 22, 1908 (p. 25).

When the cargo was tendered to plaintiff in error, the latter refused to accept or pay for the same, upon which breach of contract this action is founded. Defendant in error complied exactly and literally with the contract by tendering "*a full cargo of Ta-* "*hiti copra of fair average quality, 'tale quale', on* "*quay in San Francisco, per brig 'Lurline';*" and it is admitted that, on October 11, 1907, the date of the contract, the brig *was, in fact,* "en route from Puget Sound to Taiohae and/or Papeete".

2. Points in Issue.

Plaintiff in error claims the right to reject the cargo on the ground that the brig, after loading part of her cargo at Papeete, completed her loading at Taiohae, instead of returning from Papeete directly to San Francisco; and on the further ground that the cargo was not tendered within a reasonable time.

These contentions clearly involve a *construction of the contract.*

Plaintiff in error contends *first,* that the article tendered by us was not "the very article itself which was purchased", on account of an alleged deviation of the brig; and *second,* that, at any rate, the tender of the article on quay in San Francisco was not made within a reasonable time. The other points made by plaintiff in error are negligible.

Before discussing these contentions, we submit that the intention of the parties is definitely revealed by the expressions used in their contract, and that it is entirely unnecessary to resort to outside evidence to make this intention clear. The most casual reading of the contract must satisfy any unbiased mind that the parties intended to insist upon the following agreements, and no other ones, by the language which they used:

First. That the brig, on October 11, 1907, was in fact en route from Puget Sound to Taiohae and/or Papeete. (The existence of this fact is conceded.)

SECOND. That the outward voyage should be "To Taiohae and/or Papeete".

THIRD. That Taiohae and/or Papeete, at any rate, should be permissible loading ports.

Plaintiff in error *adds* conditions and warranties to the contract which not only are not expressed in it, but which are either expressly or impliedly excluded from it.

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3. Brief of the Argument.

a. THERE WAS NO WARRANTY THAT THE BRIG MUST LOAD HER FULL CARGO IN PAPEETE AND RETURN THENCE DIRECTLY TO SAN FRANCISCO.

The contract does not define the whole voyage of the brig to the loading ports and back to San Francisco, but only her *outward voyage* for the delivery of her cargo of lumber.

"It defines the outward voyage", as counsel insisted at the trial (p. 46). At that time counsel was obviously unwilling to concede that the contract defines anything beyond the outward voyage, objecting that it does not even, "in any manner, refer to the " ports of loading; * * * it does not mention " ports of loading at all" (p. 46). Since then counsel have changed their mind as to the bearing and extent of this contract. Under their present contention the contract defines the return voyage, and contains a *condition precedent, or warranty,* that the return voyage should be from Papeete direct to San

Francisco. Of course such a "warranty" is not discoverable on the face of this contract by the most powerful microscope, and it is therefor argued that the much-needed warranty is *"necessarily and legally implied"* (Brief, p. 16).

It would have been easy for the intelligent parties to this action to express this, or any other condition or warranty, upon which they intended to rely; they could have said "now en route to Taiohae and/or " Papeete, *and warranted to return directly to San " Francisco with a full cargo"*. They did not say so, and presumably had no intention to make such a condition. Hence the necessity for the argument that this "warranty" is "necessarily and legally implied"; that, "if it clearly appears by necessary im- " plication from what is stated in the contract that " the ship will sail for San Francisco, that act be- " comes a part of the agreement, even though the " words actually so saying be not found" (Brief, p. 18).

In effect this argument is: We admit that the cargo tendered is, in every respect, in accordance with the terms of the contract, except that it was carried to San Francisco by one sailing route, whereas it should have arrived by another; and we admit that no condition precedent that it should have been so carried by the other sailing route is expressed in the contract by words actually so saying; but we claim that it is implied by law.

If now we look at the contract, we find that, by its express terms, plaintiff in error was bound to accept the goods, if (i) goods of the agreed quality arrived "on quay in San Francisco, per brig 'Lurline' "; and if (ii) in fact, the "Lurline" was "en route from Puget Sound to Taiohae and/or Papeete", on October 11, 1907. It is conceded that both of these conditions were strictly and literally satisfied. Hence, if the Court consults what the contract *expresses,* there is no defense to this action for breach of contract; for the article which was tendered to plaintiff in error answers the description perfectly.

Plaintiff in error asks the Court not only to insert a term in this written contract which is not in it, but to insert a term which is in conflict with express provisions of the contract. In the last paragraph it is expressly stipulated that the contract shall "hold "good if the goods, or any portion thereof, be tran- "shipped and arrive in other vessel or vessels". If an accident had happened to the "Lurline" at Papeete, and her copra cargo had been transhipped into a vessel that carried it to San Francisco via Taiohae, plaintiff in error would be bound to receive it on quay at San Francisco. The only condition imposed is that the goods should *"arrive",* not that they should arrive by any specified route. Again, counsel's contention is in conflict with the last express provision of the contract: "In *the* case of loss of vessel, contract to be void". That was *the* case, the only case stipulated by the parties, in which the

contract was to be void; in every other case it was to be valid.

The contract expressly provided that it should be valid, if

(i) the vessel arrived; *and*

(ii) the goods, on arrival, were on board.

Johnson v. Macdonald, 9 M. & W. 600 (Benjamin, Sales, p. 583).

It is directly in the face of this express agreement that an effort is made to persuade the Court to adopt a contradictory construction by inserting words, "even though the words actually so saying be not "found".

If it be true, as counsel held at the trial, that the contract is silent as to the loading of the cargo, the law identifies this silence with an undertaking that the "Tahiti copra" must be loaded in the *customary way,* and defendant is precluded from claiming that the vessel must find her cargo in a *particular* way, viz., a full cargo at Papeete, whence she must return directly to San Francisco.

No implied condition precedent that the goods tendered must have arrived by the direct sailing route from Papeete to San Francisco finds room in the contract side by side with its express stipulations.

The authorities cited by our learned opponents do not support their contention. "The identity of

the goods offered with those bargained for" (Brief, p. 21) is the test upon which these authorities insist, and upon which we are content to stand. The whole question is: Were the goods offered "a full cargo of " Tahiti copra of fair average quality, tale quale, on " quay in San Francisco, per brig 'Lurline', (on " October 11, 1907) en route from Puget Sound to " Taiohae and/or Papeete"? Our opponents must admit that the goods offered were *identical with that description.*

The authorities cited are *Ellis v. Thompson,* 2 M. & W. 452; *Filley v. Pope,* 115 U. S. 213, *Norrington v. Wright,* 115 U. S. 188, and *Bowes v. Shand,* 2 App. Cas. 455, and we bow to the principles applied in these celebrated cases. In *Ellis v. Thompson* the Court held, in effect, that goods shipped from an inland place at the date of the contract, to be carried to a seaport and thence to London, are not the identical goods contracted for and described as shipped at the seaport on that day. In *Filley v. Pope* the Supreme Court held that a contract of sale of pig iron, "shipment from Glasgow", is not fulfilled by tendering pig iron shipped from Leith. In *Bowes v. Shand* the House of Lords held that a contract to sell rice "to be shipped during the month of March " and April" is not fulfilled by tendering rice shipped in February. The principle governing all these cases is picturesquely stated by Lord Cairns as follows:

> "If you contract to sell peas, you cannot oblige a party to take beans; if the description of the article tendered is different in any respect, it is not the article bargained for."

Mr. Benjamin (Sales, p. 592) explains this statement in the words:

> "What the learned lord means is that no part of the description should fail, not that the failure of any incident or stipulation would necessarily be a failure of part of the description."

In the case at bar the cargo tendered corresponded with the description "a full cargo of Tahiti " copra of fair average quality, tale quale, on quay " at San Francisco, per brig Lurline", no matter if it came from Papeete to San Francisco direct or via Taiohae. Even if the contract had, after the words " now en route from Puget Sound to Taiohae and/ " or Papeete", added the words: "thence back to San Francisco", such a provision would not, like *time* of shipment or *place* of shipment, be part of the description, but would, in our opinion, be at most a *mere incident* in the transportation of the goods. When the proper article is shipped at the proper time and in the proper place, the goods are identified as the ones contracted for; whether they are carried from Papeete by one sailing route or another does not go to the root of the matter, but affects it at most partially, and is capable of being compensated for in damages. It would not be a valid ground for a rescission of the contract. In other words, the doctrine of deviation, borrowed

from the law of marine insurance, has no place in the law of sales.

What was the article agreed to be bought, as defined by the cases above cited? The contract answers the question: "A full cargo of Tahiti copra " of fair average quality, tale quale, per brig Lur- " line", described to be "now en route to Taiohae and/or Papeete". What was the article tendered to plaintiff in error on quay in San Francisco? "A " full cargo of Tahiti copra of fair average quality, " tale quale, per brig 'Lurline'," which, at the time of the contract, was correctly described as being "en route to Taiohae and/or Papeete". The thing tendered was identical with the thing contracted for; it was "the same article that they had bargained for".

Distorting the "rule of identity and what appertains to identity" (Brief, p. 26), counsel argue that the only copra which defendant was bound to accept was Tahiti copra which arrived in the Lurline from Papeete on the most direct sailing course to San Francisco; that the route by which the copra arrived was part of its description. It is a description by silence, supplied by defendant's imagination. The contract made by the parties describes the outward voyage of the "Lurline" for the purpose of discharging her cargo of lumber. What she is to do after having discharged her outward cargo, is: First, to find a full cargo of Tahiti copra, and second, to deliver it on quay at San Francisco. *How* she is to fulfill these two requirements, the contract

does not specify. Very often parties to a mercantile contract do not specify in their writing customs or usages of the trade with reference to which they contract, such as the customary mode of manufacturing the goods, or the customary mode of collecting the articles; in such cases it is *intended that the current usage on the subject of manufacturing, or gathering, the goods is an implied term of the contract.*

> "In all contracts, as to the subject-matter of which known usages prevail, parties are found to proceed with the tacit assumption of these usages; they commonly reduce into writing the special particulars of their agreement, but omit to specify these known usages, which are included, however, as of course, by mutual understanding."
>
> Lord Coleridge in *Brown v. Byrne,* 3 E. & B. 703.

The evidence shows what the custom was in obtaining a cargo of Tahiti copra in the copra islands, and that the "Lurline" gathered her cargo in the customary manner; also that she, as soon as she had a full cargo, proceeded directly to San Francisco and tendered her cargo to defendant on quay in San Francisco.

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b. THE WRITTEN CONTRACT CANNOT BE EXTENDED, OR MODIFIED, BY THE PRELIMINARY CORRESPONDENCE OF THE PARTIES.

After straining the written contract to the breaking point, and adding words and meanings which are

absent, defendant attempts to extend and modify its import by parol evidence.

In that part of defendant's brief which covers article II, beginning on page 27, it is stated that "the " Court ruled that the communications which passed " between the parties prior to the signing of the con- " tract could not be admitted except for the purpose " of indicating to the jury what should be taken to " be a reasonable time, but not to contradict the con- " tract" (p. 27), and that "the Court charged the " jury that they might be considered on the point of " reasonable time" (p. 35).

Defendant, dissatisfied with this, now contends that the preliminary letters should have been admitted as *part of the contract,* "for the purpose of " placing the Court in the position of being able to " read the contract". The Court is here invited to disregard an elementary rule of law and to look outside of the contract in order to determine its meaning.

We confidently submit that this invitation must be declined with the same firmness with which the law rejects the attempt involved in counsel's first point, viz., to read words into the contract which are not in it, and to strike out others which are express parts thereof. The rule that a formal written contract between the parties supersedes all prior negotiations and agreements, and that oral testimony of prior and contemporaneous promises will not be admitted, is so elementary that it is hardly necessary to cite authori-

ties. *Seitz v. Refrigerating Co.,* 141 U. S. 517, and *Godkin v. Monahan,* 83 Fed. 116, settle the matter in the Federal Courts, and the following is an excellent statement of the doctrine taken from *Germain Fruit Co. v. Armsby Co.,* 153 Cal. 585:

> "If it (the writing) imports on its face to be a complete expression of the whole agreement—that is, *contains such language as imports a complete legal obligation*—it is to be *presumed* that the parties have introduced into it *every material item and term;* and parol evidence *cannot* be admitted *to add another term* to the agreement, *although the writing contains nothing* on the particular one to which parol evidence is directed. The rule *forbids* to *add* by parol *when the writing is* SILENT, as well as to vary when it speaks."

We proceed to discuss the authorities relied upon by defendant.

The case of *Davison v. Van Lingen,* 113 U. S. 40 (p. 28), is a case of construction of a contract. The question was: What is the meaning of the words "now sailed, or about to sail, from Benizal *with* "*cargo* for Philadelphia." The Court held that, *in order to have "sailed with cargo", she must have had her cargo on board, so, if it is agreed she is about to sail with cargo, the meaning is, that she has her cargo on board, and is ready to sail.* To read this conclusion, the Court did not for one moment look up from the exact words used, nor supply words which were not in the contract. It did not need or use prior conversations, so that it might properly read the words quoted. Nor is the fact that a lower Court

may give an erroneous construction to a contract a good reason for maintaining that "the language was susceptible of a double meaning".

In *Peisch v. Dixon* (p. 29) plaintiff offered parol evidence to help out his construction of a written contract. Judge Story admitted it provisionally, " reserving the right to direct the jury to disregard " it, if it shall hereafter appear to me inadmissible". Thereafter he instructed the jury very properly that " the agreement relied on in the present case is in " writing, and the construction of it is a mere ques- " tion of law for the determination of the Court". He thereupon proceeded to instruct the jury as to what its meaning was, as derived from the *expressions used* in the contract.

In *Pacific Coast Co. v. Yukon Transportation Co.,* 155 Fed. 29, decided by this Court, the bill of lading provided that the cargo of the steamer "Senator" was "to be delivered at the port, place or landing of St. Michaels". When the steamer arrived at destination, the harbor was not accessible on account of ice, and she therefore carried her cargo back to Seattle instead of waiting till the port should be free from ice. It seems to us that the agreement itself, without parol evidence, was sufficient to place upon the steamer the duty "to deliver at the port", and that her return to Seattle was a non-performance of that duty. Without looking outside of the contract, the Court was able to decide that cargo "to be delivered at Nome", means, cargo to be delivered at

Nome at the termination of *this* voyage, and not a subsequent voyage. The evidence of prior parol agreements simply tended to *confirm* the natural meaning of the contract, and its admission could do no harm. However, the fact emphasized by this Court, that "the bills of lading were issued after " the goods had been delivered on board the Senator, " and after they had passed from the control of the " shipper", is sufficient to show that the real contract between the parties was the *oral* contract; and if so, it could of course be shown in evidence.

There is nothing in the cases cited, or any of them, to give color to the claim that the previous letters can be considered in construing the formal contract signed between the parties. It is safe to say that every well considered case in point holds emphatically that such letters are never available as parts of a later contract formally executed. Even though the rule is that, generally speaking, the circumstances in which the parties were placed when they made the writing, may be shown as throwing light upon the transaction evidenced by the writing, it is a universal principle that *prior statements* of the parties cannot be considered in the determination of the question, what their contract is, except only in one single case. This single exception is that of a latent ambiguity, or equivocation, and it does not operate in this case for two reasons: First, because, assuming a case of equivocation, the admissible prior statements must be declarations of *fact,* and not, as

here, mere expressions of expectation and surmise (*Stange v. Wilson,* 17 Mich. 350), least of all surmise that was palpably improbable; and secondly, because we have before us *not* a case of equivocation, but a contract which defines completely every obligation to be performed by the parties thereto. Counsel seems to conclude that, because this contract is silent as to the time and manner of loading the Tahiti copra, and sailing route of the "Lurline" after arriving at her destination for the discharge of her outward cargo, the parties intended the document expressly signed by them as their contract not to be the whole contract, but only a part of it. Such a view is flagrantly opposed to settled principles. The true view is that the silence respecting the *time of the tender* of the cargo on quay at San Francisco is tantamount with a positive stipulation that the tender must be made within a reasonable time; that the silence respecting the *manner of loading* is tantamount with a positive stipulation that the vessel must be loaded in accordance with the customs and usages of the copra trade. Any attempt to show, by evidence aliunde, that the tender was to be made on a specific day, or that the loading was to proceed in a specific sequence, is an attempt to contradict the implied, yet positive, stipulations of the contract.

The attempt to construe the meaning of the contract by "subsequent transactions and communications" (Brief, p. 33), is made directly in the face of first principles of "a well established rule, never

questioned". Declarations of intention are not to be consulted, even if made prior to the contract (*1 Greenleaf,* 16th edition, Sec. 305 K). The writing alone is the legal act. This principle applies with particular force to declarations subsequently made; if they could reflect any light upon the intention of the parties when the written contract is made, no written contract could be safely considered as the legal act of the parties, as the monument of their agreement. But apart from law, there is a patent fallacy in the logic used in this part of the argument. The letter was written November 16th, or 15 days before the "Lurline" arrived in Papeete. Assuming it to be a fact that, on November 16th, there were 100 tons of copra available for shipment in Papeete, and that plaintiff could have known this fact (the evidence shows nothing of the kind), it does not follow that plaintiff could, before November 16, make any "*finding* that it could load only 105 tons at Papeete" after December 1st. In the two intervening weeks the situation would be expected to change. The evidence shows that "the ports at " which a sailing boat touches are hard to reach by " mail, and it is not always the case that a cargo is " available; it sometimes happens that a cargo is " picked up at several ports; it is not always possi- " ble that the cargo is ready" (p. 91). One of the uncertainties to be expected in this trade is that the vessel must "load a cargo of Tahiti copra in the " islands wherever she can find it, and *then* return to " San Francisco" (p. 93). "The term Tahiti copra

"applies to copra produced from those groups of "islands generally in the neighborhood of Tahiti. "* * * Small boats accumulate from the neigh- "boring islands and unload at certain shipping "ports" (p. 97). Again, the letters exchanged on January 28 and 29, 1908, can have no bearing upon the question: What was the meaning of the written contract signed by the parties on October 11, 1907? Defendant's understanding of it in January is certainly not evidence that could aid the Court in construing its objective meaning. The intention of the parties must be found exclusively from the expression of that intention as contained in their formal contract.

c. We have shown that there is nothing in the agreement from which it can be gathered that the parties intended that the voyage of the cargo sold should begin at Papeete, and *that it should be a direct voyage to San Francisco.* We have shown further that a denial of the right of the "Lurline" to complete her loading of copra at Taiohae is in flagrant conflict with two plain provisions of the contract: First, the provision *implied* by law from the silence as to any particular sequence in following her loading ports, that she could follow the *customary* method of picking up her full cargo in the copra islands "wherever "she can find it, and *then* return to San Francisco" (p. 93); and Second, the provisions *expressed* in the contract, at the end thereof, which specify when, and when only, the contract shall be void.

Behind this so-called "deviation" from Papeete to Taiohae there lies really the question of *reasonable time* to be consumed in loading the cargo and returning therewith to San Francisco. The sailing route by which these goods arrived cannot affect their quality or character, except in so far as it determines the question as to whether they were tendered to the buyer within a reasonable time under the contract. The jury, in the light of all the circumstances, including the letters of October 9th and 10th, found that delivery was offered within a reasonable time.

In our opinion we should have been justified in asking the Court for an instruction that, under the evidence, the tender was made within a reasonable time as a *matter of law;* but we were willing to take the chance of leaving this question with the jury, so confident were we of the effect of the evidence. The question of reasonable time, *in this case, could have been settled by the Court,* for the reason, first, that the *facts were undisputed,* and second, that the question of reasonable time is, under the issues raised by defendant's answer, conclusively determined by the construction given to the contract with respect to the alleged deviation.

The answer alleges that, "by so doing" (returning to Taiohae), "the said cargo was not delivered to defendant within a reasonable time" (p. 16), and again, "by reason of said deviation and violation of " said warranty, the said cargo of Tahiti copra, per " the said brig 'Lurline', was in the delivery thereof

" to defendant at San Francisco, *delayed* two months " or thereabouts" (p. 18). In other words, this defence identifies the "deviation" and delay; it alleges that the number of days required by going from Papeete to Taiohae was a "delay", an unreasonable expenditure of time. It follows, therefore, that this question of reasonable time is a mere corrollary of the fundamental question, whether, by a proper construction of the contract, the "Lurline" had the right, after partly loading at Papeete, to complete her loading at Taiohae before returning to San Francisco. After the Court has once decided that there was no breach of warranty by deviation, it follows as a *necessary conclusion* that the time consumed in fulfilling the contract was reasonable, for it appears nowhere in evidence that any time was lost in sailing or loading.

It is not true, under any aspect of the case, that the result of proceeding from Papeete to Taiohae was a going back, or a "loss of thirty-eight days". The route from Taiohae to San Francisco is very much shorter than the route from Papeete to San Francisco; therefore, if the "Lurline" consumed 23 days in proceeding from Papeete to Taiohae, she thereby arrived at a place nearer to San Francisco, and from which the voyage to San Francisco was correspondingly shorter than the voyage from Papeete to San Francisco. It follows from this that the time added by completing the loading at Taiohae is less than 23 days, or considerably less

than the margin that is customarily allowed for a voyage of this length by sailing vessel. In other words, had the "Lurline" loaded a full cargo at Papeete and thence returned directly to San Francisco, without touching at Papeete, and had she, *owing to conditions of wind and weather,* arrived in San Francisco on February 22nd, defendant could not have made the objection that she did not, under the contract, arrive within a reasonable time. Defendant would have been bound to accept the cargo.

The argument that "an insurance policy issued on " its cargo to the defendant, which should be based " on the voyage described in the contract, would be " nullified by the voyage actually made, by reason of " the deviation" (Brief, pp. 17, 37), involves the *assumption* that the contract in suit contains a warranty not to go from Papeete to Taiohae, and therefore begs the question.

The argument of counsel places great reliance upon the cases of *Ellis v. Thompson, Cocker v. Franklin Co.* and *Stange v. Wilson,* and it becomes therefore important to examine the doctrine of these cases. We respectfully submit that the learned judge who tried the case at bar followed with great care in the footsteps of these authorities, and that, in at least one important respect, defendant has reason to consider itself favored, by the instructions given, beyond the limits which are permitted by the doctrine of *Stange v. Wilson.*

The principle followed by all these cases is this: Where the contract is in writing, but is *silent* as to *the time of performance,* the law supplies the omission, by implying a reasonable time. In such written sales parol evidence is not admissible to show that a particular time for delivery was agreed upon. *Facts* and *circumstances* attending the sale may be shown for the purpose of determining, what *is* a reasonable time; but parol evidence of opinions, expectations, etc., is barred out for any purpose.

Mechem, Sections 1132, 1133.

In *Ellis v. Thompson,* 3 M. & W. 452 (1838), there was a written contract providing for the sale of lead, to be delivered in London. The broker stated to the buyer that the lead *was* ready for shipment, and that Gloucester and Liverpool were the usual ports of shipment, to London. It was held, that the parol representation of the broker, that the lead was ready for shipment, was admissible in evidence, *not to vary the written contract,* but as one of the data from which the *reasonableness* of the time could be determined. It will be noticed that the statement of the broker was the statement of an alleged *fact.*

The distinction between statements of *facts,* receivable to determine the question of reasonable time of performance of a contract, and mere "statements of *opinion* and probabilities, uttered by a "young man, sanguine in his expectations, and, "without doubt, honorably made", is emphasized

by *Judge Story* in *Cocker v. Manufacturing Co.*, 3 Sumn. 530 (1839). The written contract in that case did not specify any time at which the goods sold were to be delivered. It was held:

1. The law implies a contract that they should be delivered within a reasonable time.

2. *No evidence is admissible to prove a specific time* at which they were to be delivered.

Parol evidence was admitted to show the circumstances under which the contract was made, and *what the parties thought was a reasonable time* for performing it, just as, in the present case, "the "judge charged the jury that they might be con- "sidered on the point of reasonable time" (Brief, p. 35).

A more recent case on this subject, and one making unanswerable discriminations, which are exactly applicable to the case at bar, is

Stange v. Wilson, 17 Mich. 341 (1868).

In that case there was a written contract for the manufacture of iron work to be used in a building. No time of performance was specified. Parol evidence was offered, on behalf of the buyer, of a contemporaneous agreement that the iron should be furnished at specified times.

The Court held, that the evidence was properly excluded.

It was claimed, on the argument, that the evidence was admissible on two grounds: 1. To remedy the

omission in the written contract. 2. *To show what was a reasonable time.*

On the first point Judge Campbell says:

> "Where the written agreement is left in that indefinite shape, an agreement to make it definite is an agreement to alter it, and this cannot be done by contemporaneous parol understanding."

On the second point the Court, while recognizing its greater plausibility, ruled likewise that the evidence must be excluded.

It was offered to show that, at the time of making the written contract, *it was agreed, by parol,* that the work should be finished *as fast as it might be required by the masons and carpenters.* Judge Campbell said:

> "It seems to me that it has no real tendency to show what time is reasonable, either alone, or as a step in natural connection with any other proof proposed or relevant * * * To prove, when a reasonable time is agreed upon, that at the same time it is understood what time would be reasonable, is equivalent to proving they agreed on that time either absolutely or conditionally, but it is no proof whatever of the only important point, which is, whether the time was really reasonable. *Opinions* are excluded from evidence because they are conclusions which the Court or jury are to draw for themselves. * * * They are only binding when the expression of an opinion is equivalent to the assertion of a *fact.* But in this case a fact is sought to be deduced from an opinion, when the existence of the opinion itself is only inferred from an agreement, and when the agreement is void."

The Michigan Court, on this particular point, disapproves the case of *Cocker v. Franklin Co.,* and *would not admit such letters as were offered in the case at bar even for the purpose of showing reasonable time of performance.* It refers to *Ellis v. Thompson* as announcing the true doctrine, that the *facts* on which the parties acted, and the assertions of one concerning the existence of *facts* on which the others relied, may always be shown to explain their conduct, and to show the basis of their action, but adds significantly:

> "*Proof of facts* is a very different thing from *proof of promises.*"

In conclusion the Court says:

> "There is in none of these cases, nor in any others that I have found (except the case in 3rd Sumner), any intimation that the proof, which was not valid to prove new terms to an agreement, was valid to affect it indirectly, by raising presumptions concerning the belief or expectation of the parties. It is hardly possible that such a case of testimony would have eluded the ingenuity of so many learned courts and counsel, if it is really admissible. And if such proof is to be received, it is manifest that the rule excluding parol evidence will become very difficult and uncertain in its application, if not entirely useless. The distinction is too refined to be safe, and the presumption required too remote and contingent to furnish any substantial foundation for legal judgment."

We submit that it is impossible to answer the reasoning of the Court in this case, and that the case is the final authority on this subject. We submit,

therefore, that defendant received an advantage to which it was not entitled, when the letters of October 9 and October 10 were placed before the jury or considered by the Court for any purpose.

In *Johnson's Adm. v. McCune,* 27 Mo., 171, it was held that

A letter offering employment on board a boat in process of construction, stating that the writer *"expects"* the boat to be out by a certain time, cannot be construed to be a warranty that the boat would be out by that, or any other particular time.

In *Bold v. Rainor,* 1 M. & W. 343, a broker stated:

> "We have this day bought for you certain goods, to be delivered ex C., *expected to arrive* about November or December."

It was held, that this statement of expectation was not a part of the contract. We submit that even if the phrase, that "the 'Lurline' is expected to be dis- " patched from Papeete to San Francisco sometime " this fall, and we look for her arrival on or about " December 15th" were embodied in the written contract of October 11, 1907, it would not have the effect claimed by our learned opponents.

In answer to the points raised by plaintiff in error we have shown:

1. That we did tender "the very article itself which was purchased", viz.: "a full cargo of Tahiti " copra of fair average quality, tale quale, on quay " in San Francisco, per Brig 'Lurline' " (the latter

being, on October 11, 1907, "en route from Puget Sound to Taiohae and/or Papeete"), and thereby fulfilled the implied warranty of identity of the goods sold.

2. That the contract called for tender of the goods within a reasonable time, and that the jury found that they were in fact tendered within a reasonable time. That the attempt to show, by parol evidence, that the goods should have been tendered at a *particular* time, is foreclosed by established principles of law.

A recapitulation of the leading features of this case shows that the apparent difficulties which have been injected into it have their origin rather in the ingenuity of the defense made than in any inherent complication. The case is simple in its facts, and the principles of law governing it are few and easily applied. The whole case hinges upon the interpretation and construction of a mercantile contract.

There are three stages provided in this contract:

First. The outward voyage of the "Lurline" with her cargo of lumber, to be carried to the islands where the schooner was to load her full cargo of Tahiti copra. This part of the transaction contains the only warranty in the contract, for the obvious reason that it was susceptible of being reduced to sufficient certainty, viz.: that the Brig "Lurline" was " en route from Puget Sound to Taiohae and/or " Papeete".

SECOND. The securing of the subject-matter of the sale, viz.: "a full cargo of Tahiti copra". The contract *does not specify* the mode or order of securing it, for the obvious reason that this phase of the transaction, by the custom of the trade, involved necessary uncertainty, as the evidence shows. The legal effect is, that the cargo must be secured in the manner customary in the copra trade. The evidence shows that it was so secured.

THIRD. The homeward voyage of the "Lurline" with her cargo of Tahiti copra to the place of delivery, on quay in San Francisco. Again the contract does not specifically describe this voyage, either as to place of beginning, time of beginning or duration, for the obvious reason that the parties to the contract knew the necessary uncertainties in that regard and intended to agree that all these items should be met in a customary and reasonable way.

We submit that the problems involved in this case must, by legal necessity, be solved in the manner in which they were solved in the court below; that the questions submitted to the jury were susceptible of only one answer, and that, if the jury had answered them in any other way, the verdict would be set aside by the Court. We submit that the judgment of the Circuit Court should be affirmed, with costs to defendant in error.

Respectfully submitted,

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